

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number _____

Meeting Type: Regular

Meeting Date: 10/10/2013

Action Requested By:
Legal

Agenda Item Type
Resolution

Subject Matter:

Modification No. 2 to Annexation and Development Agreement

Exact Wordling for the Agenda:

Resolution authorizing the Mayor to execute Modification No. 2 to the Annexation and Development Agreement between the City of Huntsville and LW Redstone adopted and approved by Resolution No. 10-208.

Note: If amendment, please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what Council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost:

Budgeted Item: Yes

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head: _____

Date: _____

RESOLUTION NO. 13- _____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and he is hereby authorized to enter into a Modification No. 2 to the Annexation and Development Agreement by and between the City of Huntsville and LW Redstone Company, LLC, on behalf of the City of Huntsville, a municipal corporation in the State of Alabama, which said agreement is substantially in words and figures similar to that certain document attached hereto and identified as "Modification No. 2 to Annexation and Development Agreement between the City of Huntsville and LW Redstone Company, LLC, adopted and approved by Resolution No. 10-208," consisting of seven (7) pages including Exhibit A, and the date of October 10, 2013, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, an executed copy of said document being permanently kept on file in the Office of the City Clerk-Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 10th day of October, 2013.

President of the City Council of
the City of Huntsville, Alabama

APPROVED this the 10th day of October, 2013.

Mayor of the City of
Huntsville, Alabama

STATE OF ALABAMA)
COUNTY OF MADISON)

**MODIFICATION NO. 2
TO ANNEXATION AND DEVELOPMENT
AGREEMENT BETWEEN THE CITY OF
HUNTSVILLE AND LW REDSTONE
COMPANY, LLC, AS ADOPTED AND
APPROVED BY RESOLUTION
NO. 10-208 ON MARCH 25TH, 2010, AND AS
AMENDED BY RESOLUTION NO. 12-428
(MODIFICATION NO. 1).**

MODIFICATION NO. 2

This Modification No. 2 (this "Amendment") is hereby made as of the 10th day of October, 2013, to the Annexation and Development Agreement dated March 25, 2010 between THE CITY OF HUNTSVILLE, ALABAMA, a municipal corporation organized and existing pursuant to the laws of the State of Alabama ("City") and LW REDSTONE COMPANY, LLC, a Delaware limited liability company ("Owner") as modified by that certain Modification No. 1 dated May 24, 2012, (collectively, the "Agreement").

RECITALS

WHEREAS, City and Owner have determined that the provisions set forth in paragraph 4.4 of the Agreement with respect to the platting of the lands within the Project Site, and the acceptance and maintenance of City Work, including work to be maintained by Owner, is not feasible and/or is not adequately provided for and the parties have agreed to revise paragraph 4.4 of the Agreement to provide a process that will accommodate same;

WHEREAS, the parties hereto desire to agree upon and enter into such other amendments and agreements as may be set forth herein in order to effectuate the purposes and intent of the Agreement.

NOW THEREFORE, in consideration of the Recitals and the mutual covenants and promises of the City and Owner herein contained, the City and Owner agree as follows:

MODIFICATIONS TO ORIGINAL AGREEMENT

1. Paragraph 4.4 of the Agreement is hereby deleted in its entirety and replaced with the following:

"4.4 Preparation and Filing of Plats; Acceptance/Maintenance of City Work.

(a) Owner and City agree that the lands embraced within the Project Site have or will be divided into separate areas of land to be platted for the purposes of development ("Development Area(s)"). With respect to each Development Area, after Owner and City reach agreement with respect to the Approved Work Plans (as defined in paragraph 6.3 hereof) for a Development Area, but before the City Work contemplated by such Approved Work Plans may be completed, the Owner will have a proposed plat prepared for such Development Area consistent with the Approved Work Plans and this Agreement ("Proposed Plat"). The Proposed Plat will be circulated by the Owner to the City and the appropriate representatives of the United States Army at the Redstone Arsenal for their review and approval. Once all parties have reviewed and approved the Proposed Plat ("Final Plat"), the Owner will:

- (i) circulate the Final Plat for execution by the City's Engineer, the licensed land surveyor that prepared the Final Plat, Huntsville Utilities (water, gas, and

electric, as applicable), and the duly authorized representatives of the Owner, the mortgage holder(s), if any, and the United States Army at the Redstone Arsenal; and

(ii) obtain and deliver to the City Attorney a title opinion or letter, suitable in form and content to the City Attorney, (1) showing that there are no easements or other encumbrances on the property that would operate to defeat the dedication or use of the easements to be dedicated to the City with the recording of the Final Plat, unless such easements or encumbrances are subordinated to the easements to be dedicated to the City, (2) identifying the holders of legal and equitable title to the lands embraced by the Final Plat, and (3) certifying that those signing on behalf of the Owner and mortgage holder, if any, are the appropriate signatories and are duly authorized to so act.

The Owner will, thereafter, arrange to have the executed Final Plat recorded in the Madison County land records. Upon recordation of the Final Plat, the City shall have been dedicated those easements which are shown on the plat in its favor ("**City Easement(s)**"). The parties hereto acknowledge, confirm and agree that the Final Plat may be recorded prior to the completion of the City Work that is contemplated by the Approved Work Plans for the Development Area of such Final Plat. The City acknowledges that the Planning Commission of the City of Huntsville has no jurisdiction over the Property or any plat prepared in connection therewith, and that no approvals of the Planning Commission will be required. The City also acknowledges that Owner may, at any time and from time to time, amend a Final Plat as required for consistency with Owner's Site and development plans; provided that the process established in this paragraph 4.4 for the final platting of lands is followed.

(b) When City Work that the City has agreed to maintain in accordance with this Agreement is (i) within the lands embraced by a recorded Final Plat, (ii) has been completed in accordance with the Approved Work Plans, and (iii) is fully operational without direct dependence on any other portion of City Work within the Project Site including land within or outside lands embraced by the Final Plat, ("**Proposed City Maintenance Work**") then the City will, in accordance with the process set forth in this subparagraph (b), accept the Proposed City Maintenance Work for maintenance ("**City Maintenance Work**"). Prior to acceptance of the Proposed City Maintenance Work, the City may, at its option, request that the Project Manager deliver to the City a letter of certification from a third party testing service or similar professional that all inspections, tests and other quality control measures, as required by the City's specifications, have been performed at a frequency and of a number as required, and that all constructed improvements that constitute the Proposed City Maintenance Work are in the City Easements, including but not limited to the right-of-way easement(s), set forth in the Final Plat ("**Certification**"). Within thirty (30) days after receipt of the Certification, or thirty (30) days after completion of the Proposed City Maintenance Work, if the City does not deem it necessary to obtain the Certification, the City shall provide to the Owner a letter of acceptance executed by the Mayor and City's Engineer, who are hereby authorized to execute said letter on behalf of the City, acknowledging that: (x) the Proposed City Maintenance Work is in order for acceptance, (y) has been accepted by the City for maintenance as City Maintenance Work, and (z) the City shall commence maintenance of the City Maintenance Work as set forth in this Agreement. Notwithstanding the provisions of this paragraph 4.4 hereof or any other provision of this Agreement, City Work not located in a City Easement shall not be City Maintenance Work.

(c)(i) Notwithstanding the provisions of this paragraph 4.4 hereof and in accordance with the other provisions of this Agreement, Owner and City agree and acknowledge that Owner will have the responsibility for maintaining the communications manholes and duct banks designed to house communications facilities (“Duct Bank(s)”), landscaping within and along public rights of ways, irrigation systems, Gateway monument signs, retention or detention ponds, and such other City Work as the Owner and the City reasonably determine to be the Owner’s obligation to maintain, which Owner has accepted as “Owner Maintenance Work” in accordance with this subparagraph. When City Work that is to become Owner Maintenance Work has been completed in accordance with the Approved Work Plans and is fully operational (“Proposed Owner Maintenance Work”), the City shall notify the Owner that the Proposed Owner Maintenance Work has been constructed in accordance with the Approved Work Plans. Owner shall have thirty (30) days after receipt of the aforementioned notice from the City to inspect the Proposed Owner Maintenance Work and confirm whether the work has been constructed in accordance with the Approved Work Plans. Within ten (10) days after such thirty (30) day period, the Owner shall either deliver to the City its written acceptance of the Proposed Owner Maintenance Work, at which time the work will become the Owner Maintenance Work, or deliver to the City its written rejection of the Proposed Owner Maintenance Work and, based on the Approved Work Plans, state the deficiencies that are the reason for the rejection. The foregoing process shall be repeated until the Proposed Owner Maintenance Work is in order for acceptance. Owner and City agree that, as of the date of this Agreement, there is certain Proposed Owner Maintenance Work, more particularly described on the attached Exhibit A, which is incorporated herein by reference that Owner will accept, upon its execution of this Amendment, as Owner Maintenance Work without the need for following the process set forth in this subparagraph.

(ii) Owner shall be responsible for maintaining the Owner Maintenance Work, including, but not necessarily limited to, its maintenance, repair, replacement, and other work associated with the Owner Maintenance Work. Owner shall also be responsible for the restoration, repair, and/or replacement of infrastructure and improvements, including but not necessarily limited to City Work before and after its acceptance by the City, damaged or destroyed as a result of the use and occupancy of City Easements by the Owner Maintenance Work. In addition, Owner shall, at its cost, expense, and risk, upon the request of the City, promptly protect, support, temporarily disconnect, relocate in, or remove from the City Easements, all or any portion of the Owner Maintenance Work whenever required by the City upon reasonable notice, in order for the City to perform its construction and/or maintenance responsibilities. The City shall not be obligated to maintain, repair, or replace the Owner Maintenance Work or to otherwise perform any work associated with the Owner Maintenance Work, except as may expressly be provided for in the Agreement. Nothing in this paragraph shall be construed to prevent the Owner from passing along the cost, expense, and/or risk associated with the Owner Maintenance Work to its tenants or, in the case of the Duct Bank(s), to the communications providers using the Duct Bank(s).

(iii) Upon delivery of the Owner’s written acceptance, the Owner shall have the exclusive right to use the Duct Bank(s) and to determine which communications providers are permitted to use the Duct Banks, provided, that the Owner complies with the terms and conditions of this paragraph 4.4, and applicable law, including federal, state, county, and city ordinances and regulations, with respect to the use, operation, and maintenance of the Duct Bank(s).

(iv) Owner shall have the obligation to pay fees and taxes, if any, assessed in connection with the Duct Banks and, to the extent the Duct Banks are to be included in the assessed value of the Project, shall be calculated into the PILOT Payments made to the City in accordance with paragraph 7.7 of the Agreement. Owner shall not mortgage, pledge, or otherwise encumber the Duct Banks that are located in the City Easements.

2. As further amendment to the Agreement paragraph 6.6 (b) of the Agreement is hereby deleted in its entirety and replaced with the following:

“(b) In consideration of the City’s agreement to engage a Project Manager recommended by the Owner and to have the responsibilities described in paragraph 6.7 hereof which include, among other things, the management of the schedule for all City Work, the Owner hereby excuses the City for any delays or other issues which can be attributed in whole or part to the work of the Project Manager or work performed by the City at the request of the Owner that is described herein as a Project Manager responsibility in paragraph 6.7.2.”

3. Additionally, the Agreement is amended in that paragraph 6.7.3 is deleted in its entirety and replaced with the following:

“6.7.3 Error or Omissions of Project Manager. Anything in this Agreement to the contrary notwithstanding, under no circumstances shall the City be responsible or otherwise liable to the Owner or any other person for any error or omission caused by the Project Manager or by the City in the City’s performance of any duties listed herein in paragraph 6.7.2 as responsibilities of the Project Manager, it being the understanding of the parties hereto that the Owner has required the engagement of the Project Manager respecting the oversight and management of various aspects of the Public Infrastructure Improvements.”

4. Lastly, the Agreement is further amended by adding Paragraph 6.7.5 which shall read as follows:

“6.7.5 With the written consent and approval of the City Engineer and the Mayor, the Owner may assign some Project Manager responsibilities temporarily to the City’s Engineering Department. Any such assignment shall be at the specific written request of the Owner and shall be defined specifically in terms of the duration of the assignment and the responsibilities assigned.”

5. The parties hereby ratify the Agreement, as hereby amended, and confirm that the Agreement, as hereby amended, remains in full force and effect. If any provision of this Amendment conflicts with the terms or conditions of the Agreement, then the provisions of this Amendment shall be controlling.

6. This Amendment may be executed in multiple counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one agreement.

[Signatures are on the next page.]

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first above written.

(“OWNER”)

LW REDSTONE COMPANY, LLC
a Delaware Limited Liability Company

By: _____
Name:
Its:

STATE OF MARYLAND)
COUNTY OF HOWARD)

I, the undersigned, a Notary Public in and for said County and in said State, hereby certify that _____, as _____, of LW Redstone Company, LLC, a Delaware Limited Liability Company, signed to the foregoing document, and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, (s)he, as such officer and with full authority, executed the same for and as the act of said Limited Liability Company on the date the same bears date.

GIVEN under my hand and official seal this the _____ day of _____, 2013.

_____(SEAL)
Notary Public
My Commission Expires: _____

[Signatures continue on the next page.]

THE CITY OF HUNTSVILLE, ALABAMA
a municipal corporation

Tommy Battle, Its Mayor

Charles E. Hagood
Its: Clerk-Treasurer

I, the undersigned, a Notary Public in and for said County and in said State, hereby certify that Tommy Battle and Charles E. Hagood, whose names as Mayor and City Clerk-Treasurer, respectively, of the City of Huntsville, Alabama, a municipal corporation, are signed to the foregoing document, and who are known to me, acknowledged before me on this day that, being informed of the contents of the instrument, they, as such officers and with full authority, executed the same for and as the act of said municipal corporation on the date the same bears date.

Notary Public
My Commission Expires: _____

EXHIBIT A

OWNER MAINTENANCE WORK

As of the date of this Modification No 2 to the Annexation and Development Agreement between the City of Huntsville and LW Redstone Company, LLC (Owner) and as a part of it's obligation under the terms and conditions of that agreement, the City of Huntsville has completed the construction of numerous City Work . The maintenance of certain portions of that City Work already constructed is the responsibility of the Owner and, upon its execution of this Amendment, the Owner accepts the following City Work as Owner Maintenance Work:

- Irrigation and landscaping constructed under City of Huntsville bid packages 1F and 1G (City of Huntsville resolutions 11-573 and 12-434.)
- Communications manholes and ductbanks constructed under City of Huntsville bid packages 1B and 1F (City of Huntsville resolutions 11-281 and 12-343.)
- Monument signs constructed under City of Huntsville bid package 1H (City of Huntsville resolution 12-433.)
- Mass graded building pads and common areas constructed under City of Huntsville bid packages 1A and 1F (City of Huntsville resolutions 10-1027 and 12-75.)

ROUTING SLIP CONTRACTS AND AGREEMENTS

Originating Department: Legal

Council Meeting Date: **10/10/2013**

Department Contact: **Peter Joffrion**

Phone # **427-5026**

Contract or Agreement: **Mod. 2 to Annexation and Development Agreement**

Document Name: **Mod. 2 to Annexation and Development Agreement**

City Obligation Amount:

Total Project Budget:

Uncommitted Account Balance:






Account Number:

Procurement Agreements

<u>Not Applicable</u>	<u>Not Applicable</u>
-----------------------	-----------------------

Grant-Funded Agreements

<u>Not Applicable</u>	Grant Name:
-----------------------	-------------

Department	Signature	Date
1) Originating		10-4-13
2) Legal		10-4-13
3) Finance 		10/4
4) Originating		10-4-13
5) Copy Distribution		
a. Mayor's office (1 copies)		
b. Clerk-Treasurer (Original & 2 copies)		